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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. ERNEST LANE MORALES, Defendant and Appellant.	C084560 (Super. Ct. No. CRF 16-1056)

Defendant Ernest Lane Morales appeals after a jury found him guilty of arson of an inhabited structure and acquitted him of five counts of attempted murder. He contends the court erred by denying his motion for a mistrial, admitting evidence of his drug use, and incorrectly instructing the jury regarding the intent required for arson. He further argues the prosecutor committed misconduct by eliciting inadmissible evidence and that cumulative error resulted. Finding no merit in defendant's claims, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Fire

Defendant lived with his elderly mother in a three-bedroom mobile home. Also living in the mobile home was defendant's niece, Sherry Solorzano,[1] and her son Sturlin Sims. Defendant's mother was the only person listed on the lease for the mobile home. In October 2015, defendant's mother moved into a care facility and Sherry's other son, Zachary Solorzano, moved into the home with his two children. Before the move, defendant threatened multiple times to burn down the mobile home if Sherry or her sons tried to make him leave or take the home away from him.

After defendant's mother moved, the relationship between defendant and Sherry deteriorated. Sherry and her sons were upset with defendant for not contributing to the household by paying rent or buying food. Defendant would usually get a disability check at the beginning of every month and leave the home for seven to 10 days before returning with no money for the household. Upon his return, he and Sherry would fight about his failure to contribute to the household finances. As a result, Sherry asked defendant to move out of the mobile home on multiple occasions.

On February 21, 2016, Sherry, Zachary, and Sims were in the kitchen of the mobile home with Zachary's children eating breakfast. Sims saw defendant pack his belongings in his bedroom, which he also did the day before. Defendant carried his belongings to the backyard by putting them onto his wheelchair or into his wire laundry basket to transport them outside. He also packed items in suitcases he moved outside. Defendant did not appear to have any problem leaving the mobile home through the door leading to the back porch, which Sims saw him use over 10 times that morning. All

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[1] Because multiple witnesses share the Solorzano surname, we refer to them by their first names. No disrespect is intended.

during breakfast and throughout the day, Zachary and Sims used the sink in the kitchen without a problem.

In the afternoon, Zachary was brushing his teeth at the kitchen sink. He and Sims saw defendant leave the mobile home through the back door and approximately 15 to 30 minutes later Sims asked Zachary, "What is that?" referring to something outside of the mobile home. Zachary looked out the back window and saw an orange glow he immediately recognized as fire.[2] He went to the back door and tried to open it, but was only able to open it six to eight inches. It looked as though bags of clothing obstructed the door from opening further. Also while trying to open the door, flames came into the mobile home, which caused Zachary to close the door and flee with the rest of his family through the front door.

Once outside, Zachary and Sims ran to the back of the mobile home and attempted to use the garden hose to contain the fire until the fire department could arrive. Although Zachary turned the nozzle, water did not come out of the garden hose. Sims saw that the main water line to the house had been turned off, so he turned it on to allow the water to flow. Because it takes a few minutes for the water to run after being shut off through the main line, Zachary decided to salvage property from inside the mobile home instead of trying to contain the fire. He went inside the home through the front door, but became disoriented within seconds from the smoke and fell. He crawled out of the mobile home and did not attempt to go back inside.

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[2] Sims testified at trial that 15 minutes after defendant left the mobile home for the last time he noticed the back porch was on fire; however, at the preliminary hearing he testified it was 30 minutes. Zachary testified at trial that 30 minutes elapsed between the last time he saw defendant and when he first noticed the fire, but admitted it could have been 15 minutes. Defendant's neighbor testified that while taking out the trash she saw defendant on the back porch of his mobile home. It took her five to 10 minutes to take out the trash and when she returned to her mobile home she saw defendant's trailer was on fire. She did not see defendant holding a cigarette.

While outside, Sims saw the suitcases defendant removed from the house near the garden hose; the suitcases were not damaged. He also saw defendant behind the backyard fence with his wheelchair. Instead of accompanying Zachary to salvage property from inside the mobile home, Sims ran after defendant. When he caught up to him, defendant turned around with a cigarette in his hand, then put his hands up and said, "I didn't do it." Sims slapped defendant in the face causing him to fall to the ground. He then went back to the mobile home, and Zachary approached defendant, keeping him in the area until police arrived.

When police arrived, defendant told Officer Bandon Swonger of the Woodland Police Department that he came outside of the mobile home to put out his cigarette in the ash tray usually kept on the back porch, but could not find it. So he threw the cigarette on the back porch assuming the cigarette was not burning. Defendant described the back porch as a "fire hazard" because clothing and other trash was scattered around. He acknowledged that his cigarette caused the fire but claimed it was an accident and that he would never throw a lit cigarette onto the porch. He also admitted he had previously threatened to burn down the mobile home during an argument with a member of the Solorzano family about their living arrangements. When booked into jail, officers recovered two matchbooks, a lighter, and an instruction manual for a lighter in defendant's possession. Several matches were missing from the matchbook. Defendant did not have any cigarettes in his possession.

Detective Matt Jameson of the Woodland Police Department conducted an investigation of the fire. He discovered that firefighters found aerosol cans on the back porch of the mobile home. Although Sims claimed there were other cans of flammable material on the porch, including paint and paint thinner, Jameson did not look for or collect any of these cans as evidence because he believed fire personnel were responsible for evidence collection during an arson investigation. For this same reason, he failed to

preserve defendant's clothing properly and could not test it for the presence of accelerants.

Jim Burgess, an engineer with the Woodland Fire Department, responded to the fire, which took 20 to 30 minutes to put out. Once put out, he observed "extensive fire damage, destruction to the exterior patio, and one bedroom and the kitchen structure were damaged as well. The rest of the structure was damaged by heat and smoke." Burgess pinpointed the fire's origin to the back porch because the large amount of damage indicated the fire burned there the longest. Burgess described the back porch as a fire hazard with clothing, papers, old equipment, appliances, and aerosol cans causing a lot of clutter.

In Burgess's opinion, the fire was started by an open flame because it was a quick developing fire. He based this opinion on statements from Zachary describing the time he last saw defendant until he noticed the fire. A fire that took 30 minutes to start, however, would be more consistent with a slow developing fire that could be the result of a lit cigarette igniting a fuel source. Burgess acknowledged there was no physical evidence establishing the time it took the fire to develop and his opinion depended on the accuracy of Zachary's statements.

Burgess ruled out an electrical problem as the cause of the fire because there was no electrical source on the back porch that could have spontaneously caused a fire. Burgess also ruled out gas as the cause of the fire because, although he did see aerosol cans on the porch, the cans were six to eight feet from the origin of the fire. The cans may have contributed to the fire's growth but not to its creation. Similarly, the fire most likely did not start from a smoldering cigarette. For a fire to start, the cigarette would have to be applied directly to a fuel source, such as clothing or paper, and would be slow to develop. As the cigarette gets shorter, the duration of time the heat is exposed to the fuel source diminishes, leaving less time to ignite a fire. Burgess could not provide a specific timeframe for a lit cigarette to cause a fire because several factors are at play,

including fuel type, humidity, and wind conditions. On the day of the fire it was 67 degrees with no rain. It is possible for a fully lit cigarette to ignite a fuel source but it is much faster and easier for a person to ignite a fuel source with an open flame, such as a lighter or matches.

II

Relevant Trial Proceedings

Defendant moved to exclude evidence of his drug use, which the prosecution sought to offer into evidence to show defendant's motive for starting the fire. According to the prosecutor, she intended to call a social worker with Adult Protective Services to testify that she told defendant in September 2015 he could not live with his mother in the mobile home if he continued to use drugs. After telling him this, defendant threatened to burn down the mobile home. The court allowed the evidence, despite the fact defendant's mother moved out of the mobile home, on the prosecutor's theory that "defendant's position is that if I'm not going to be able to live in this trailer, no one is. So his thinking is that these other three are trying to kick him out of the trailer. And he's not going to let that happen. Because he would rather it not be there than let them have it. That's what he has said."

During trial, however, the social worker was not called as a witness and instead defendant's drug use was admitted in a variety of ways. Its first mention was by Sims while he was identifying items in the suitcase recovered from outside the mobile home after the fire. Among other items, Sims identified a "straw" found in the suitcase as something that belonged to defendant that he used as "a drug tool." Its second mention came during cross-examination of Sherry when asked about her "life long drug [addiction]." Sherry responded that she had been taking methadone for 28 years and was

not a drug addict.[3] Defense counsel then asked whether Sherry previously used heroin, to which she answered, "Yes, 28 years ago. My uncle introduced me to that." Defense counsel objected and moved to strike the answer. The court told the jury, "The last comment will be disregarded." Despite the court's ruling, the prosecutor's first question on her redirect examination was: "When you say your uncle introduced you to heroin, were you talking about [defendant]?" While defense counsel objected, Sherry answered, "Yes." The court interjected to say, "Stricken. Stricken. Listen, I struck the answer on that question, so this is not a[n] issue before the jury. The question is stricken. [¶] If the witness blurted an answer out, that will be stricken and will be disregarded." The prosecutor then asked whether defendant used drugs in the mobile home and Sherry confirmed that he did. The last mention of drug use was from defendant's sister who testified she did not visit the mobile home after her mother moved out because she did not like the "atmosphere" given that there was "[a] lot of drug use."

Defendant also moved to exclude any mention he spent time in prison or was on parole. The prosecutor agreed to caution her witnesses against revealing that defendant spent time in prison. Despite the prosecutor's efforts, Sherry testified defendant had been "in prison most of his life" when asked what her relationship with defendant was like. Defense counsel immediately objected and moved to strike Sherry's answer. The judge sustained the objection and struck the answer before admonishing the jury as follows: "Jury will disregard that comment. The question, ma'am, is your relationship with [defendant]." She responded that her relationship with defendant was "fine." During cross-examination, when asked whether she had ever contacted police about defendant's threats, Sherry testified she had not, but "when [defendant's mother] was in the

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[3] Defense counsel's questioning of Sherry's history of drug use was a clear violation of the court's in limine ruling; however, the prosecutor did not object to defense counsel's line of questioning.

convalescent hospital, [she] did talk to [defendant's] probation officer and told him what [defendant] said about [the threats]."

Defense counsel later moved for a mistrial based on Sherry's testimony. The court denied the motion after taking a recess to analyze the issue. The court found "[t]he breach was serious, but not fatal to a fair trial. [¶] The court notes that the answer was not elicited by any question from the prosecution. The prosecution instructed witnesses to not mention prison, the witness simply blurted it out at the conclusion of an answer. [¶] The court granted defenses [*sic*] motion to strike. The jury was instructed to disregard it. I will consider any other remedies defense wishes to suggest, so. Think about it. And if there's anything else you wish to suggest, short [of] a mistrial, I will absolutely consider it."

Later, however, the prosecutor offered defendant's prior felony convictions into evidence to impeach his out of court statements. As a result of the court admitting two of defendant's felony convictions, the parties stipulated defendant was convicted of theft from an elder in 2014 and being a felon in possession of a firearm in 2012. The court instructed the jury it could only use evidence of defendant's felony convictions to determine defendant's credibility and impeach his out of court statements. Defendant never moved for additional remedies related to Sherry's unsolicited testimony regarding defendant's criminal history.

DISCUSSION

I

The Trial Court Did Not Abuse Its Discretion In Denying Defendant's Motion For A Mistrial

Defendant contends the trial court erred in finding Sherry's unsolicited false testimony that he spent most of his life in prison did not rise to the level of "incurable prejudice," the standard for granting mistrial motions. He urges us, however, not to review his claim under the abuse of discretion standard reserved for appellate review of

mistrial motions. Instead, he argues that by objecting, his counsel reserved the de novo issue of whether "incurable prejudice" resulted from Sherry's testimony. Defendant has not cited any authority supporting this argument and we find none.

Indeed, " '[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 986.) "Whether a particular incident is incurably prejudicial requires a nuanced, fact-based analysis." (*People v. Chatman* (2006) 38 Cal.4th 344, 369-370.) The trial court is in a better position to judge in the first instance the level of prejudice resulting from inadmissible evidence being revealed to the jury. We will not substitute our judgment for that of the trial judge, who was a witness to the incident and the jury's reaction. Accordingly, we decline to review defendant's claim under the de novo standard of review and instead will use the traditional abuse of discretion standard reserved for claims involving the denial of a mistrial motion. (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

" 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.' " (*People v. Cox*, *supra*, 30 Cal.4th at p. 953; *People v. Bolden* (2002) 29 Cal.4th 515, 555.) "A witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice." (*People v. Ledesma* (2006) 39 Cal.4th 641, 683.) "[E]xposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial." (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580.) "Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured." (*People v. Martin* (1983) 150 Cal.App.3d 148, 163.) "It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . .

cannot be removed by the court's admonitions.' " (*People v. Allen* (1978) 77 Cal.App.3d 924, 935.)

Whether exceptional circumstances exist "depends upon the facts in each case." (*People v. Allen, supra,* 77 Cal.App.3d at p. 935.) Defendant asserts those circumstances exist here and the court's admonition was insufficient to cure the prejudice resulting from Sherry's testimony and later allusion to defendant's probation officer. Defendant relies on cases where exceptional circumstances have been found. The commonality of those cases is that they were all close cases in which the defendant's credibility was fundamental to his defense, or his identity was in conflict.

For example, *Allen,* which defendant relies on, was "an extremely close case in which the jury had to make its fact determination based upon the credibility of the [defendant] and his witnesses and on the credibility of the prosecution's witnesses." (*People v. Allen, supra,* 77 Cal.App.3d at p. 935.) Under those circumstances, an admonition to disregard testimony that defendant was "on parole" was held to be insufficient to overcome the substantial danger of undue prejudice the testimony caused. (*Id*. at p. 938.) Similarly, in *People v. Ozuna* (1963) 213 Cal.App.2d 338, the Court of Appeal concluded an admonition to the jury could not remove the prejudicial effect of testimony referring to the defendant as an "ex-convict." (*Id.* at p. 339.) *Ozuna* also was a close case, in which the defendant was charged with his girlfriend's murder. (*Ibid*.) He was the only eyewitness, and he told police the gun had fired accidentally. (*Id*. at p. 340.) His first trial ended in a mistrial after the jury was unable to agree on a verdict. (*Id*. at p. 339.) Also relied upon by defendant is *People v. Figuieredo* (1955) 130 Cal.App.2d 498, where the investigating officer mentioned the defendant "did time," which the prosecutor elicited in a calculated attempt to disclose the defendant was a convict. (*Id.* at pp. 505-506.) The appellate court found it prejudicial prosecutorial misconduct requiring reversal because there was a significant "conflict in the evidence as to the identity of the [perpetrator]." (*Id.* at p. 504.)

Defendant's case was not close and is thus distinguishable from the cases he relies upon. Defendant is right to observe his intent was a central issue of the case. He told officers the fire started accidentally when he threw what he thought was an extinguished cigarette onto the back porch. The prosecution, on the other hand, contended defendant started the fire with an open flame or his lit cigarette. There were no percipient witnesses to the fire, no physical evidence of the fire's cause was collected, and the fire expert's conclusions rested predominantly on statements of a prosecution witness. Despite the lack of evidence showing how defendant started the fire, defendant's guilt did not depend on whether the jury believed defendant or the victims as were the circumstances in *Allen* and *Ozuna*.

Undisputed evidence supported defendant's guilt in addition to the testimony of Sherry and her sons. Defendant's neighbor saw him without a cigarette near the origin of the fire around the time the fire started. Defendant's sister testified she found defendant's suitcases packed with his property outside of the mobile home safe from the fire, corroborating Sherry's sons' testimony that defendant packed his belongings and removed them from the mobile home. Further, defendant acknowledged he previously threatened to burn down the mobile home and that he was responsible in some form for the fire. A lighter and matches—sources of open flames—were recovered from his possession, and defendant was not in possession of cigarettes following the fire. Although defendant's intent was a key issue of the case, the determination of his intent did not rest upon his credibility compared to Sherry's and her sons' credibility alone, but rested on his credibility compared to independent and undisputed evidence as well.

Moreover, the statement was brief and not in response to the prosecutor's question. Indeed, the prosecutor asked Sherry about her relationship with defendant, to which she did not respond except to say that defendant was in prison most of his life. The question could not reasonably be said to have been an attempt to elicit prejudicial inadmissible evidence, as was the case in *Figuieredo*. The court immediately struck

Sherry's response and delivered an admonition telling the jury to disregard her testimony. Although the jury later heard reference by Sherry to defendant's probation officer, the jury knew Sherry and defendant had a long-standing dispute regarding the mobile home and did not get along. This doubtlessly factored into the jury's credibility analysis of Sherry's testimony on this point, especially given the court's instruction to consider a witness's bias when evaluating his or her testimony. We agree with defendant that Sherry's testimony was not ambiguous regarding defendant's criminal history, but the fact she clearly held animosity towards defendant ensured the court's immediate admonition to ignore Sherry's already suspect testimony would be honored.

Because defendant's case was not a close case wherein his criminal history would have affected the jury's determination of his guilt, defendant has not shown the court's admonition to disregard Sherry's testimony that defendant was in prison most of his life was insufficient to cure the prejudice that may have resulted. Accordingly, the court did not err in denying defendant's motion for a mistrial. For the same reasons we reject defendant's claim his right to due process and a fair trial were violated.

II

The Court Properly Instructed The Jury Regarding

The Required Mental State For Arson

Before closing arguments, the court instructed the jury as it pertains to the mental state required for arson as follows: "The defendant is charged in Count 6 with arson that burned an inhabited structure, in violation of Penal Code Section 451[, subdivision] (b). To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant set fire to or burned a structure. [¶] Two, he acted willfully and maliciously. [¶] And, [three], the fire burned an inhabited structure." The court defined willfully as when a person acts "willingly or on purpose. Someone acts maliciously when he or she intentionally does a wrongful act or she acts with the unlawful intent to defraud, annoy, or injur[e] someone else." After instructing the jury on the lesser

included offense of unlawfully causing a fire of an inhabited structure, which required defendant to have acted recklessly, the court concluded: "Arson, and unlawfully causing a fire require different mental states. For arson, a person must act willfully and maliciously. For unlawfully causing a fire, a person must act recklessly. [¶] As to general or specific intent crimes, the defendant is not guilty of attempted murder or arson of an inhabited dwelling if he acted or failed to act without the intent required for that crime, but acted instead accidentally."

Defendant contends the trial court's instruction was improper because it incorrectly stated the law of malice. Specifically, he argues the instruction should have explained " 'a wrongful act' " required a finding that "the direct, natural, and highly probable consequence of the defendant's act" was a fire. Defendant argues the instruction as worded allowed the jury to find him guilty of arson even if it accepted his theory he threw a cigarette onto the porch. Defendant explains the jury could have determined his throwing of the cigarette constituted the intentionally wrongful act without also finding the fire "was the 'direct, natural, and highly probable' consequence of that act." We disagree.

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"The arson chapter [of the Penal Code] defines 'maliciously' as involving 'a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.' ([Pen. Code,] § 450, subd. (e).)" (*In re V.V.* (2011) 51 Cal.4th 1020, 1027.) "The Supreme Court has explained the necessary

intent for arson: ‘ “Because the offensive or dangerous character of the defendant’s conduct, by virtue of its nature, contemplates such injury [(the burning of a relevant property)], a general criminal intent to commit the act suffices to establish the requisite mental state.” [Citation.] Thus, there must be a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable consequences would be the burning of the relevant structure or property.’ ” (*Mason v. Superior Court* (2015) 242 Cal.App.4th 773, 784.) The “ ‘willful and malice requirement ensures that the setting of the fire must be a deliberate and intentional act, as distinguished from an accidental or unintentional ignition or act of setting a fire.’ ” (*In re V.V., supra*, 51 Cal.4th at p. 1029.)

The parties agreed the back porch was a fire hazard. Defendant admitted it was while giving his statement to police. The other residents of the mobile home and defendant’s sister also testified the porch was cluttered and treated as a storage area. The fire investigator described the back porch as a fire hazard containing clothing, papers, aerosol cans, and appliances. With this in mind, the parties limited their argument to the question of whether defendant set the fire through a deliberate and intentional act or whether he did so accidentally. The prosecutor argued defendant did so intentionally by sparking a lighter or lighting a cigarette and then throwing it on the porch. Defendant argued he did not intentionally and deliberately start a fire because he thought his cigarette was extinguished when he threw it. The expert’s testimony centered around which theory was more likely.

The evidence and theories presented by the parties centered around defendant’s act of setting the fire—whether it was purposeful and deliberate or accidental. If the jury believed defendant’s theory that he thought he extinguished his cigarette before throwing it on the porch, then the fire sparked accidentally and defendant was entitled to acquittal under the instruction. If, on the other hand, the jury accepted the prosecution’s theory

that defendant intentionally sparked a lighter or cigarette before knowingly throwing it onto the porch, then it was required to find him guilty.

Defendant relies on *In re V.V., supra,* 51 Cal.4th at p. 1029, a case that considered the sufficiency of evidence required for an arson conviction, to support his argument the jury should have been additionally instructed as to the particular definition of "wrongful act" announced there. Defendant's reliance on *In re V.V.* is misplaced. In that case, juveniles threw ignited firecrackers into dry brush. Our Supreme Court held the juveniles "were not required to know or be subjectively aware that the fire would be the probable consequence of their acts." (*Id.* at p. 1030.) Instead, "[a] defendant may be guilty of arson if he or she acts with awareness of facts that would lead a reasonable person to realize that the direct, natural, and highly probable consequence of *igniting and throwing* a firecracker into dry brush would be the burning of the hillside." (*Ibid*., italics added.)

Unlike *In re V.V.*, the dispute here was not whether defendant could reasonably know his act would lead to burning of the porch but whether he intentionally and deliberately threw an ignited fire source onto the porch. Because the state of the porch was known to be a fire hazard, an affirmative answer leads to a willful and malicious mental state, while a negative answer leads to an accidental mental state and acquittal. This is a proper statement of the law responsive to the evidence presented and the theories argued by the parties. (See *In re V.V., supra,* 51 Cal.4th at p. 1033 (dis. opn. of Kennard, J.) [the "arson statute applies only to fires that are set *deliberately*, not to those set *accidentally*"].) Accordingly, no instructional error occurred.

III

The Court Erred In Admitting Evidence Of Defendant's Drug Use And The Prosecutor Committed Misconduct While Questioning Sherry On The Topic; However, The Errors Were Harmless

Defendant brings two claims related to evidence of his drug use. The first claim, which the People properly concede, is prosecutorial misconduct regarding the

prosecutor's question to Sherry about whether defendant was the uncle who introduced her to heroin. As the People point out, the trial court excluded this evidence during defendant's cross-examination of Sherry and it was misconduct for the prosecutor to ask Sherry a question designed to elicit this excluded evidence. (See *People v. Crew* (2003) 31 Cal.4th 822, 839 ["[i]t is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order"].)[4] Regardless of the prosecutor's conduct, the People argue, any error was harmless.

Defendant's second claim related to his drug use pertains to the court's initial ruling that the evidence was generally admissible, which defendant contends was error. The People argue the court properly ruled for admission based on the prosecution's proffer that a social worker would testify defendant's drug use was a reason he was previously asked to move out of the mobile home, thus it constituted his motive for starting the fire. As we will explain, we agree with defendant that admission of his drug use was error. Instead of then addressing the resulting prejudice from this error, we will analyze the prejudice in conjunction with the prejudice resulting from the prosecutor's misconduct since both errors are state law errors.[5] But, because no error resulted from the court's denial of defendant's mistrial motion or from the arson instruction, this will constitute the cumulative error review defendant contends we should enter. We conclude defendant was not cumulatively harmed by the court's and the prosecutor's errors.

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[4] While we conclude the prosecutor committed misconduct under state law, we reject the contention the error was federal in nature. The prosecutor's misconduct was limited to a single question and cannot be said to constitute a pattern of conduct designed to deny defendant a fair trial. (See *People v. Hill* (1998) 17 Cal.4th 800, 819 [" ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' "].)

[5] As will be explained, we do not agree with defendant that the admission of his drug use constituted federal error.

A

Evidence Of Defendant's Drug Use Should Have Been Excluded

All relevant evidence is admissible unless otherwise provided. (Evid. Code, § 351.) The California Supreme Court has held, however, that "evidence of an accused's narcotics addiction is inadmissible where it 'tends only remotely or to an insignificant degree to prove a material fact in the case. . . .' " (*People v. Cardenas* (1982) 31 Cal.3d 897, 906.) On appeal, the reviewing court determines whether the trial court abused its discretion in admitting the evidence. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.)

Felix illustrates what a prosecutor must demonstrate in order to introduce evidence of a defendant's drug use. (*People v. Felix* (1994) 23 Cal.App.4th 1385.) In *Felix*, the defendant was convicted of burglarizing a family member's home. The defendant introduced testimony by his sister, who indicated that he had implied consent to enter her house at any time and consent to take any items he wished. (*Id*. at pp. 1390-1392.) To rebut this claim, the prosecution introduced the sister's testimony that she was in fact distressed about her brother's condition due to his drug use. (*Id*. at p. 1392.)

The *Felix* court distinguished their facts from the facts of *People v. Bartlett* (1967) 256 Cal.App.2d 787 and *People v. Davis* (1965) 233 Cal.App.2d 156. The *Felix* court held that, unlike in *Bartlett* and *Davis*, the prosecution had established a direct connection between the burglary of the sister's house and the defendant's drug use. To establish the direct connection, the prosecution introduced testimony of the investigating officer who claimed the defendant admitted to burglarizing the home in order to buy drugs with the proceeds. (*People v. Felix*, *supra*, 23 Cal.App.4th at pp. 1393-1394.) In both *Bartlett* and *Davis*, the testimony linking the drug use to the crime was the mere observations of the arresting officers. (*People v. Bartlett*, *supra*, at p. 790; *People v. Davis*, *supra*, at pp. 159-160.) In both cases, the defendants appeared to be under the influence at the time of arrest, but in each case the time of arrest was several days after the commission of the crime. (*People v. Bartlett*, *supra*, at pp. 789-790; *People v. Davis*, *supra*, at pp. 157-160.)

Thus, the officer's testimony in *Felix* was distinguishable from the facts of *Bartlett* and *Davis* since the connection was not made merely "by the opinion of an officer based on observations on an unrelated occasion." (*People v. Felix, supra,* at p. 1394.)

Here, there was no direct connection between defendant's drug use and the fire on the back porch. The victims of defendant's fire testified they asked him to move out of the mobile home because he did not contribute to the household expenses. The prosecutor did not proffer that drug use was the reason defendant was asked to move by Sherry and her sons. The whole of the prosecutor's proffer was that defendant had previously been told he could not live in the mobile home with his mother as long as he used drugs. After being told he had to move, defendant threatened to burn down the mobile home. After defendant's threat, however, defendant's mother moved into a care facility, meaning the ultimatum the social worker delivered was no longer at play and defendant would not be forced to move if he continued his drug use. Thus, defendant's drug use was not a motive for the fire occurring in February 2016 after his mother moved.

This is not to say the prosecutor's proffer lacked total relevance. The relevance of the prosecutor's proffer as it relates to motive is clear—when told he could not live in the mobile home, defendant threatened to burn it down. Just like he later threatened and burned down the mobile home when the victims told him he had to move. In sum, the order that defendant move out of the mobile home provided the motive for the fire like it did in the past. Defendant's drug use was not directly connected with the arson in this case as in *People v. Felix, supra,* 23 Cal.App.4th at pages 1393-1394. Accordingly, it was error to admit evidence of defendant's drug use.[6]

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[6] We do not agree with defendant's contention the admission of his drug use denied him a fair trial. Citing *People v. Garcia* (2014) 229 Cal.App.4th 302, 318, defendant argues he was denied a neutral decision maker and the jury was likely to convict him

B

Cumulative Error Did Not Result

"In theory, the aggregate prejudice from several different errors occurring at trial could require reversal even if no single error was prejudicial by itself." (*In re Reno* (2012) 55 Cal.4th 428, 483.) The "litmus test is whether [the] defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349, disapproved on other grounds in *People v. Whitmer* (2014) 59 Cal.4th 733, 739-742.)

Here, it is not reasonably probable defendant would have received a more favorable result had evidence of his drug use been excluded. As detailed, defendant's drug use was discussed three times during testimony, all of which were limited in nature. Neither did defendant's drug use play a large part in the prosecutor's argument for guilt. In her discussion of motive, the prosecutor predominantly pointed to the animosity between the parties and attributed the cause to defendant's failure to contribute to the household. While arguing for a finding of arson and attempted murder, the prosecutor pointed to defendant's drug use once while arguing his intent to commit arson was clear because he moved his property, including his drug tool, out of the mobile home before

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because of his lifestyle. *Garcia*, however, is distinguishable. There, the prosecutor urged the jury to consider the defendant's sexual orientation in determining her guilt for continuous sexual abuse of a child. (*Id.* at pp. 309-310.) The court concluded the defendant's sexual orientation was completely irrelevant to the issue of guilt and the prosecutor's argument to the contrary denied the defendant due process because "the prosecutor employed logic that was tantalizingly attractive on its face but deeply flawed and fundamentally unfair at its core." (*Id.* at p. 318.) Here, the prosecutor did not use evidence of defendant's drug use to prove he was the type of person to set fires, nor was the jury encouraged to determine defendant's guilt based on his character. The prosecutor's use of evidence of defendant's drug use was not deeply flawed or unfair, as was the case in *Garcia*.

setting the fire. The prosecutor argued this again on rebuttal. Otherwise, there was no mention of defendant's drug use or its propensity to prove defendant committed arson.

In any event, ample evidence showed defendant purposefully started a fire resulting in the burning of the mobile home. The night and morning before the fire defendant packed his belongings and removed them from the mobile home to a safe place as though he knew they may be damaged in the coming hours if allowed to remain in the mobile home. Defendant's neighbor saw him at the location of the origin of the fire close in time to when the fire engulfed the back porch. When Sims and Zachary attempted to put out the fire, the main water line to the house had been turned off and they were unable to use the garden hose to contain the fire. No other resident of the mobile home turned off the water and they had been using the water inside the mobile home close in time to noticing the fire, suggesting the water had been turned off close in time to the fire's creation and when defendant's neighbor saw him on the back porch. Further, defendant had a long-standing disagreement with Sherry and her sons about their living arrangements and his failure to contribute to household expenses. When previously told he had to move from the mobile home, defendant would commonly threaten to burn it down. After defendant's mother moved into a care facility and before the fire in February 2016, Sherry asked defendant to move out on multiple occasions. Given defendant's prior threats, his preparation the morning of the fire, and his neighbor's observations, ample evidence shows defendant made good on his threats and set fire to the back porch.

Moreover, the jury acquitted defendant of five counts of attempted murder, showing it did not think him guilty or a criminal merely because of his history with drugs. Instead, the verdicts show the jury was capable of weighing and considering the evidence in a fair and balanced way to determine guilt. Thus, it is not reasonably probable a more favorable outcome would have resulted had evidence of defendant's

drug use been excluded from the jury's consideration. Accordingly, no cumulative error occurred.

DISPOSITION

The judgment is affirmed.

/s/
Robie, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Renner, J.